Appeal No. 2005AP2138 **Cir. Ct. No. 2003CF481**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLAN BIESTERVELD,

DEFENDANT-APPELLANT.

FILED

AUG 23, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61, this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether a circuit court, for the purpose of sentencing, may consider a "dismissed outright" charge that was part of the plea agreement?[1]

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[1] The defendant also contends that the trial court relied on inaccurate information at sentencing. However, we are satisfied that this second contention can be addressed under the supreme court's recent decision in ***State v. Tiepelman***, 2006 WI 66, No. 2004AP914-CR.

BACKGROUND

The State charged the Allan Biersterveld with two counts of repeated acts of sexual assault of a child in violation of WIS. STAT. § 948.025(1)(a) (2003-04).[2] The charges arose from repeated assaults against two females, A.R.B. and A.K.B, who were both under the age of sixteen. Biesterveld and the State entered into a plea agreement under which Biesterveld would plead guilty to Count 1, Count 2 would be "dismissed outright," and the State would recommend prison, although both sides would be free to argue. At sentencing, the circuit court discovered Count 2 because the presentence investigation report (PSI) erroneously referred to this count as a read in. The parties explained to the sentencing judge that they agreed to dismiss Count 2 "outright." However, the court informed the parties that it would consider Count 2 because it reflects upon personality, character and social traits. Biesterveld's counsel objected, but the court stood by its ruling.

The circuit court imposed a thirty-year sentence composed of twelve years of initial confinement and eighteen years of extended supervision. After being sentenced, Biesterveld filed a motion for postconviction relief to withdraw his guilty plea. In his motion, Biesterveld argued that (1) a manifest injustice occurred when the judge considered the count that was dismissed outright and (2) he did not have an opportunity to rebut information presented at sentencing. The court denied Biesterveld's postconviction motion and Biesterveld appeals.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise stated.

DISCUSSION

A defendant who seeks to withdraw a guilty plea after sentencing carries the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice. ***State v. Lackershire***, 2005 WI App 265, ¶5, 288 Wis. 2d 609, 707 N.W.2d 891, *review granted*, 2006 WI 23, __ Wis. 2d __, 712 N.W.2d 34 (Wis. Feb. 27, 2006) (No. 2005AP1189-CR). Whether to allow plea withdrawal is generally committed to the trial court's discretion, and we will reverse only if the trial court has erroneously exercised that discretion. ***Id.*** After sentencing, a defendant may withdraw a plea as a matter of right if he or she establishes that a violation of constitutional magnitude occurred during entry of the plea. ***Id.***, ¶6. To pass constitutional muster, a guilty or no contest plea must be knowing, intelligent, and voluntary. ***Id.*** Whether a plea was voluntary and knowingly entered is a question of constitutional fact that the appellate court reviews de novo. ***State v. Brown***, 2004 WI App 179, ¶5, 276 Wis. 2d 559, 687 N.W.2d 543.

In order to determine whether Biesterveld's plea was entered voluntarily and knowingly, we must address whether the term "dismissed outright" contemplates that the circuit court will not consider the charge during sentencing. Here, neither the State nor Biesterveld incorporated a definition of "dismissed outright" into their plea agreement. Furthermore, neither the Wisconsin legislature nor the judiciary have defined "dismissed outright" or distinguished it from "dismissed and read in" or "dismissed with prejudice."

The State suggests that "dismissed outright" and "dismissed and read in" present two paths to the same destination. It directs us to ***Lackershire***, where we concluded that read-in charges do not increase the range of punishment and

therefore result in only indirect consequences for the defendant. *See* ***Lackershire***, 288 Wis. 2d 609, ¶15 ("Collateral or indirect consequences of a plea are those that, among other things, do not increase the range of a defendant's potential punishment."). The State concludes that "[i]f read-ins are collateral consequences of a plea rather than direct consequences, then certainly dismissed [outright] counts that are considered at sentencing but are not read in, as in this case, are also collateral consequences." Because a defendant must be made aware of direct consequences, not collateral ones, the State contends that the circuit court's consideration of the dismissed outright charge did not violate Biesterveld's constitutional rights and that his plea was knowingly, voluntarily and intelligently made. *See* ***State v. Bollig***, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W.2d 199.

During sentencing, the State explained that it understood "dismissed outright" to mean Count 2 would be dismissed with prejudice. The circuit court later interjected that it was "dismissing it [Count 2] with prejudice right now." Thus, the State argues, Biesterveld received the benefit of the plea bargain and cannot be charged for the same conduct again.

Biesterveld argues that it is eminently reasonable for a defendant to believe that a charge being dismissed outright would not share the qualities of one being read in. More specifically, he claims that a charge being dismissed outright would not be considered by the court when imposing sentence. However, he is not clear on whether his interpretation would allow the State to reprosecute defendants for any charges "dismissed outright."

Underlying all of the arguments of the parties is the well-established law that circuit courts have broad sentencing discretion when it comes to considering dismissed charges. In ***State v. McQuay***, 154 Wis. 2d 116, 126, 452

N.W.2d 377 (1990), the supreme court stated, "In determining the character of the defendant and the need for his incarceration and rehabilitation, the court must consider whether the crime is an isolated act or a pattern of conduct. Evidence of unproven offenses involving the defendant may be considered by the court for this purpose." In ***State v. Bobbitt***, 178 Wis. 2d 11, 17-18, 503 N.W.2d 11 (Ct. App. 1993), we adopted the widespread rule that a sentencing court may consider conduct for which the defendant has been acquitted.

Unlike unproven offenses and acquittals, however, read ins constitute admissions by the defendant to those charges. ***State v. Floyd***, 2000 WI 14, ¶¶25, 27, 232 Wis. 2d 767, 606 N.W.2d 155. The implication is that more weight is placed on the read-in charges than on unproven or acquitted charges. ***Id.***, ¶27. The law provides no guidance as to the weight a sentencing court may place on a charge dismissed outright or if it may consider such a charge at all.

The concern here is that the term "dismissed outright," absent some definition, may lead a defendant to believe that it means something more beneficial than "dismissed and read in" or "dismissed with prejudice." No such confusion arises when a plea bargain states a charge will be dismissed and read in:

> "Read-in crime" means any crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted.

WIS. STAT. § 973.20(1g)(b). Furthermore, the standard "Plea Questionnaire/Waiver of Rights" form explains to criminal defendants the "effects" of read-in charges, as follows: (1) Sentencing—although the judge may consider read-in charges when imposing sentence, the maximum penalty will not

be increased; (2) Restitution—I may be required to pay restitution on any read-in charges; and (3) Future prosecution—the State may not prosecute me for any read-in charges. The form is silent as to charges dismissed outright.

CONCLUSION

Because "dismissed outright" remains undefined, the potential for competing interpretations is high, as evidenced in the present case. Because the supreme court is the superintending authority over the plea-bargaining process in Wisconsin, we respectfully request that it address the impact of a "dismissed outright" charge in a plea agreement. This will have a significant statewide impact on the plea-negotiation process.